

The Department is aware of a common misconception among some title companies and practitioners that real property can be transferred through use of a "Lack of Probate Affidavit." The persons using this document then attempt to claim exemption from Real Estate Excise Tax (REET) as well. Again, generally speaking, all estates that include real property must be probated (the exceptions are transfers pursuant to a valid community property agreement, if the deed is held as joint owners with rights of survivorship, certain trusts, and transfers mandated by court order). The nonprobate statute for personal estates under \$60,000 applies only to personal property. An adjudication on the public record (such as a probate proceeding) provides assurance that there are no pretermitted heirs or others with a right to inherit, and that the grantee is, in fact, the person entitled to inherit the property.

Frequently Asked Questions

The Department receives inquiries about this issue frequently, and we have consistently advised both the counties and the taxpayers that, in order to claim the exemption, they must provide the documentation as set forth in the rule. The Department is not telling either title companies or the counties that they cannot accept the transfer deeds; we are only telling them that in order to claim exemption from REET for the transfer, they must have the required documentation. Below are examples of some frequently asked questions.

Can a surviving spouse that does not possess a community property agreement or probated estate transfer the remaining half interest of real property to themselves or others?

No, the ability to transfer property on the death of the owner is restricted in Washington. Generally, all estates that include real property must be probated. The exceptions are: (a) transfers where the estate has a valid community property agreement, (b) trusts, only if property is being transferred under the terms of testamentary trust without probate, (c) if the property has actually been deeded to joint tenants with remainder interests, (d) a certified copy of a court order requiring the transfer of the property (this is unusual and at the discretion of the court), (e) probate through the local court which can take both time and money.

The basic premises of these laws are to ensure property is properly distributed. Safeguards include executing community property agreements, court intervention by way of probate proceedings or direct court orders.

If the estate is not probated is transferring and paying excise tax on the remaining interest an option?

No, the Revised Code of Washington and the Washington Administrative Code clearly state that if certain procedures are followed, the transfer of real property from the deceased to heirs and/or devisees is exempt from REET. Since probate is required (unless the other terms outlined above are met), paying the REET on the remaining interest is not an option.

- *Is real estate excise tax due when a married person dies and ownership interest vests in the surviving spouse?*
- *Is a probate required before the county excise tax collector will process the deed conveying the property from the surviving spouse when the exemption from payment of excise tax on the transfer of title from the dead person to the surviving spouse is not claimed?*

Answer

Generally, all estates that include real property must be probated (the statutory exceptions are discussed below). The basic premises of these laws are to ensure property is properly distributed.

Background

Washington Administrative Code (WAC) 458-61A was adopted in December 2005. The revised rule clarified documentation requirements in the case of "Inheritance or Devise" (458-61A-202). Since rule clarification, we have received questions related to the probate requirements. One of the criticisms we hear is that individuals are able to transfer real property without probate some of the time, but at other times the transfer is rejected. We continue to provide training on this issue to the counties and have seen the application of the law become more consistent. However, as more transfers are rejected, more questions of this nature are raised. Unfortunately we are unable to advise the counties and/or taxpayers differently, because without a community property agreement, probate is a requirement prior to transfer of the real property of the estate.

Applicable Laws

For Your Reference below are the Applicable Law(s):

- RCW 26.16.030(3) Community property defined. "Neither spouse shall convey.....the community real property without the other spouse joining in the execution of the deed".
- RCW 11.04.015 Descent and distribution of real and personal estate.
- RCW 11.04.250 When real estate vests "PROVIDED, That no person shall be deemed a devisee until the will has been probated".
- RCW 11.02.070 Community property – disposition "other one-half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in chapter 11.04 RCW" "whole of the community property shall be subject to probate administration".
- WAC 458-61A-202(1) Inheritance or devise.
- WAC 458-61A-202(7) Documentation requirements for Inheritance and Devise. "(a) Community property agreement (c) Probate (e) Other".
- RCW 11.02.070 addresses Community property, Disposition and Probate Administration. More directly it states" the whole of the community property shall be subject to probate administration for all purposes of this title". "Upon death of a decedent a one-half share of the community property shall be confirmed to the surviving spouse, and the other one - half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in chapter 11.04 RCW.
- RCW 11.04.015 references RCW 11.02.070 which provides that "the whole of the community property shall be subject to probate administration for all purposes of this title. This RCW further explains how real property should be distributed under various scenarios of survivors. The estate must be probated to determine successors who may be entitled to receive a portion of the estate.

While a spouse is entitled to their share of community property, the decedent may have other heirs or devisees that may have a legal claim. The probate process or other court intervention seeks to find a will that lists heirs or devisees.

- WAC 458-61A-202(1) transfer of real property by inheritance or devise is not subject to the real estate excise tax. WAC 458-61a-202(7) In order to claim this exemption, documentation must be provided, a community property agreement, a trust, probate documents or other court orders requiring the transfer of the property.